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REPLY BRIEF OF APPELLANT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

OPINIONS BELOW

People v Payne, 386 Mich 84, 191 NW2d 375 (1971), and People v Payne, 18 Mich App 42, 170 NW2d 523 (1969).

JURISDICTION

Jurisdiction was invoked under 28 USC Sub-Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

That portion of the Fourteenth Amendment stated in the Appellant's Brief.

QUESTIONS PRESENTED

Petitioner reasserts the questions presented in Petitioner's Brief.

STATEMENT OF THE CASE

The Statement of Case for the purposes of this reply brief the Petitioner relies on the Statement of the Case in Petitioner's Brief.

ARGUMENT

I. Retroactivity of *North Carolina* v *Pearce*.

Respondent has devoted the largest portion of his Brief to the question of the retroactivity of *North Carolina* v *Pearce*, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969) and on page 20 of that brief cited the newly-delivered opinion of this Court *Robinson* v *Neil*, 12 Criminal Law Reporter 3071 (January 16, 1973) in support of his position. However a careful reading of *Robinson* reveals a rationale which quite strongly supports Petitioner's position of the non-retroactivity of that portion of *Pearce* which would affect this case.

In holding that *Waller* v *Florida*, 397 US 387 (1970) was to be accorded retrospective effect, Mr. Justice Rehnquist provided a brief analysis of the relationship between the various decisions of this Court on retroactivity. While the Court did not provide an exhaustive analysis of the concepts of retroactivity and prospectivity together with the criteria which determine the application of each, it did make some relevant comments concerning the cases of the Court beginning with *Linkletter* v *Walker*, 381 US 618 (1965), comparing them with certain other decisions, for example *Furman* v *Georgia*, 408 US 238 (1972) and *Waller* v *Florida*, 397 US 387 (1970). *Robinson* makes it clear that the question of retroactivity of a new Constitutional decision in the area of criminal law depends both on the right or privilege newly-defined and on the purpose for the rule of the case.

Petitioner contends that both the right defined and the rule promulgated by *Pearce* make it a case naturally suited for prospectivity-only application under the *Linkletter* line of cases. First of all, the right defined is that of "due process' and, more specifically, the excision from, a) the sentencing process of judicial vindictiveness against a defendant for his having won an appeal, and b) the reasonable fear by a convicted defendant of such vindictiveness from the appellate process. Secondly, the rule of the case in *Pearce* as it applies to a defendant reconvicted

and resentenced after a successful appeal is tailored to prospectivity, both in the language used in the *Pearce* decision setting forth the record-making "prophylactic rule", and by the very sense and purpose of the rule, that is deterrence of illegal judicial conduct and allaying the reasonable fears of defendants contemplating appeal.

As the Court noted in *Robinson, Desist* v *United States*, 394 US 244 (1969) examined the cases decided after *Linkletter* and "more fully enunciated the guiding criteria of those cases". *Robinson, supra*, page 3072. In evaluating the relative importance of the three *Linkletter* criteria it stated at pages 249-51:

> Foremost among these factors is the *purpose to be served* by the new constitutional rule. This criterion strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule [citing and discussing *Mapp* v *Ohio*]. . . .
>
> Although there apparently have not been many Federal convictions based on evidence gathered by warrantless electronic surveilance, we have no cause to doubt that the number of State convictions obtained in reliance on pre-*Katz* decisions is substantial. . . . It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity. Because the deterrent purpose of *Katz* overwhelmingly supports non-retroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application. (Emphasis supplied.)

Pearce aimed at the deterrence of improper judicial conduct by the procedural tool of limiting the resentencing judge to certain objective factors to be placed on the record in imposing a higher sentence.

The citation in *Robinson* of *Pearce* clearly was directed towards its double jeopardy aspect, requiring that credit be given for time served on a voided conviction, since it

was coupled with citation of *Ashe* v *Swenson*, 397 US 436 (1970), in explanation of *Benton* v *Maryland*, 395 US 784 (1969).

Respondent in his brief has cited numerous authorities, and presented in his footnotes what purportedly is a survey of the application of *Pearce* by the Federal and State Courts. Furthermore in his brief he criticizes Petitioner for "misleading" this Court with regards the holdings in three cases, *United States* v *Gambert*, 433 F2d 321 (4th Circuit, 1970) and *Allen* v *Henderson*, 434 F2d 26 (5th Circuit, 1970) as well as *Commonwealth* v *Allen*, 443 PA 96, 277 Atlantic 2d 803 (1971). The Petitioner feels that the interpretation given in its brief is a reasonable one, as is clear from the context in which the cases are cited.

However Defendant has misconstrued or overextended far more than three cases. For example, on pages 11-13 in two footnotes, 3 and 4, it cites 21 cases in support of various propositions.

Under the heading "Pearce Held Retroactive And Applicable To Judge Resentencing" respondent cites 13 cases. Of those 13, 5 must be considered inaccurate.

State v *Pilcher*, 171 NW2d 251 (Iowa, 1969) decided that a sentence there imposed was to be modified pursuant to State statutory authority and the question of retroactivity of *Pearce* was expressly disregarded.

Hord v *Commonwealth*, 450 SW2d 530 (Kentucky, 1970), where a defendant, convicted of breaking and entering, sentenced to one year in prison but put on probation, was later found guilty of a probation violation and his sentence was changed to two years in prison. The Kentucky Supreme Court held that this was an *increase in an already imposed* sentence and not simply a proper punishment for violation of probation. This case has nothing to do with the retroactivity of *Pearce* to an increase in sentence following a *retrial* on the principal charge.

People v *Payne*, 386 Mich 84, 191 NW2d 375 (1971) expressly withheld ruling on the retroactivity of *Pearce* but applied it to *Payne* to instruct the lower courts in Michigan.

Miller v *State*, 471 SW2d 399 (Texas Court of Criminal Appeals, 1971) is properly entitled *Martinez* v *State*. It

involved defendant originally indicted with: Delivery of heroin with punishment enhanced by two prior convictions. In the midst of his first trial the State waived or abandoned the proof of the two prior offenses for the enhanced punishment. He was sentenced to 15 years under the primary offense. After defendant appealed and won a new trial the prior indictment was dismissed and a new indictment was brought containing the original charge. This time the state proved the two prior offenses and defendant was sentenced to life imprisonment. (This is analogous to the taking of a plea to a lesser included offense, followed by an appeal and a new trial; at such new trial the original charge may be reinstated and defendant convicted thereof.

Lastly *Denny* v *State*, 178 NW2d 625 (Wisconsin, 1970) discussed *Pearce*. However, the second sentencing there involved took place on September 25, 1969, according to information furnished Petitioner by the Wisconsin Attorney General's Office. Thus retroactivity could not have been presented to that Court.

Under the heading "Pearce Applied Retroactivity (sic) To Trial De Novo" there are additional inaccuracies.

State v *DeBonis*, 276 Atlantic 2d 137 (New Jersey, 1971) explicitly stated that *Pearce* was not needed to determine the result in that case, that it was a matter of public policy and one apart from constitutional compulsion. Furthermore, the de novo trial and sentencing occurred on January 20, 1970, thus eliminating the retroactivity issue.

Commonwealth v *Harper*, 280 Atlantic 2d 637 (Pennsylvania, 1971) involved a case in which the *original arrest* was made in *November* of *1969* according to information furnished petitioner by Joseph Murray, Assistant District Attorney for the State of Pennsylvania in Philadelphia. Thus there can be no question of a holding of retroactivity.

Cherry v *State*, 264 Atlantic 2d 887 (Maryland, 1970) involved a trial de novo, conviction and sentence which occurred on *July 14, 1969, after Pearce* was decided. Furthermore the Maryland Court of Appeals explicitly noted in its opinion that retroactivity was not involved.

Under the heading "Pearce Held Not Applicable To Judge Resentencing":

Chaffin v *State,* 180 SE2d 741 (Georgia, 1971) the court specifically found that a life sentence after retrial after a fifteen year first sentence was reversed was correct and intrepreted *Pearce* accordingly.

Under the heading on page 14, "Pearce Held Implicitly Retroactive And Applied To A Jury Sentencing": *Roberson* v *State,* 258 Southern 2d 257 (Florida, 1971) involved a crime which on the very face of the opinion is shown to have occurred *after Pearce* was decided. Thus there is no question of retroactivity.

Of the cases cited in footnote 11 of respondent's brief, *Culp* v *Bounds,* 325 F Supp 416 (DCWDNC, 1971); *Sefcheck* v *Brewer,* 301 F Supp 793 (DCSDIOWA, 1969) and *Zaffarano* v *Blackwell,* 307 F Supp 1109 (DCNDGA, 1969) are all cases dealing with credit being given for time already served, and not resentencing. Also *Griffin* v *Wilkerson,* 335 F Supp 1272 (DCWDVA, 1971) does not deal with retroactivity since all three convictions and sentences appealed from occurred in 1970. And *Walsh* v *Picard,* 328 F Supp 427 (DCMASS, 1971) dealt with appellate review of sentencing, the same case reviewed by the Massachusetts Court in *Walsh* v *Commonwealth,* 260 NE2d 911 (1970).

Lack of availability of Court records on short notice has made like research into other citations by Respondent difficult.

As to defendant's request to be afforded the protection of retroactive application should *Pearce* not be accorded retroactivity, Petitioner requests this Court to adopt June 23, 1969 as the cut-off date and hold that only *sentences imposed after* that date would be affected by the *Pearce* rule as was done in *Desist* v *United States, supra.*

AS TO PAYNE'S CONDUCT JUSTIFYING THE HIGHER SENTENCE

As to the question of whether or not Payne committed perjury at the second trial and whether or not that conduct would justify an increased sentence, it should be noted that the gist of his testimony at his trial was that of alibi.

Both the judge and the jury at the second trial considered the following evidence:

1. Identification of the defendant Leroy Payne made at the trial by Victor Yost as the person who shot him. (Trial Transcript, pp. 9-46).

2. Corroborative statements made by Vic Yost immediately after he was shot to the first officers on the scene, naming Leroy Payne as the person who shot him and giving the license number of the suspect's car (which was later identified as belonging to Leroy Payne). (Trial transcript pp. 60-62; 64-65; 74-75).

3. The fingerprint identification and ballistics identification that Leroy Payne's fingerprint was on the assault weapon. (Trial Transcript pp. 86-91; 93-101; 111-130; 138-157).

4. Leroy Payne's testimony that he was at home in bed when the shooting took place. (Trial Transcript pp. 185-208. When a defendant does not take the stand in his own defense or if, taking the stand, he simply states that he is "innocent" or "not guilty" or words to that effect, he is not making the affirmative *factual* statements that he does when he establishes an alibi for himself. He is merely stating his belief as to his position before the law. But where a defendant so establishes an alibi as to metaphysically exclude his presence at a scene of the crime, a verdict of guilt beyond a reasonable doubt *necessarily implies* that the trier of fact believes beyond a reasonable doubt that the defendant has not told the truth. Such is the case here. And this is independent of defendant's prior plea of guilty or his testimony at the Bradford trial. It is, in short, objective, detrimental conduct which occurred after the first sentencing.

Finally, it should be noted that nowhere until the filing of respondent's brief on the merits (and there by process of elimination) has it ever been alleged that Judge Byrns imposed the higher sentence out of vindictiveness for Payne's appealing. No one, not Philip Brown, Payne's attorney through his first conviction, who obtained his new

trial, who sought and received a change of venue from Judge Byrns, who tried the case, who pleaded Payne's case at the allocatur before sentencing and who finally obtained for Payne a favorable decision of the Michigan Supreme Court reducing his sentence, ever allege Judge Byrns to have acted vindictively in imposing the sentence. Nor even did Leroy Payne in his *pro per* answer to Petitioner's Application in this Court specifically allege vindictiveness on the part of Judge Byrns. Nor could they have since a careful review of the record indicates precisely the contrary.

Respectfully submitted,

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